♦ **3(B) OPEN MEETING REQUIREMENT – PRACTICES PERMITTED – PROVISION OF OVERFLOW SPACE WITH AUDIO WHEN CROWD EXCEEDED CAPACITY OF LARGE MEETING ROOM**

♦ **1(B)(3) MEETING – NOT A MEETING: SEPARATELY HELD TELEPHONE CALLS THAT DID NOT AMOUNT TO COLLECTIVE DELIBERATIONS**

***Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at** http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf

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April 27, 2016

Re: Maryland Racing Commission
Eric Rockel, *Complainant*

Eric Rockel, Complainant, alleges that the Maryland Racing Commission violated the Open Meetings Act by meeting on February 11, 2016 in a room that was too small to accommodate all of the members of the public who wished to attend and by voting by telephone to grant a permit.[1]

The Commission has responded with information, supported by its executive director's affidavit, about the capacity of the meeting space and the circumstances of the vote.

1. Adequacy of the meeting space

Complainant states that the Racing Commission met on February 11, 2016, to consider an application to hold simulcast betting at the State Fairgrounds, that the permit application had attracted considerable public attention, and that the meeting space, which had a capacity of 180 people, could not accommodate everyone who wished to attend the meeting. Complainant alleges that many people had to stand in the hallway and that

[1] Complainant also asks whether a violation of the Act in these regards would affect the decision that the Commission reached. That question lies beyond our authority, which is simply to give an advisory opinion on whether a violation has occurred. *See* §§ 3-207 and 3-209 of the General Provisions Article (2014, with 2015 supp.) of the Maryland Annotated Code, where the Act is codified.

others were reportedly turned away at the door to the building. Attached to the complaint are emails to Complainant from two members of the public. One person wrote that he left the meeting because "they had reached the limit allowed in the room." The other person reported that the meeting room was full about ten minutes before the meeting, when she and her husband arrived, that "we were to stand in the room across the hall, which had no audio or visual of the actual meeting," that "it got to the point where citizens were no longer even allowed to enter the building," and that she and her husband "decided to leave so that others could come inside to get warm." She reported a perception among those in the hallway that the meeting had been "'set up' in favor of only those in favor of the [off-track betting]."

The Commission responds that the meeting room had a capacity of 230 people, with seating for 186. The Commission states that it had expected the room to be adequate; only three members of the public had attended its public comment meeting for simulcast betting at another location, and fewer than 50 people usually attend its monthly meetings. However, 311 members of the public came to this meeting. When the room had filled to capacity, the Commission's chair announced that a speaker would be moved to the hall between the main room and an annex room so that all could hear the proceedings and that everyone who wished to offer comments would be able to do that. The Commission states that neither its members nor its staff caused anyone to be turned away at the door of the building, and they were not made aware that anyone was being denied access to the building. Of the 311 people who signed in, 190 signed in as opposing the application, and 121 supported it.

The Act states the policy that "meetings of public bodies shall be held in places reasonably accessible to individuals who would like to attend these meetings." § 3-102(c). Section 3-303(a) provides: "Whenever a public body meets in open session, the general public is entitled to attend."[2] We have inferred from these provisions that public bodies must choose meeting spaces that will accommodate the number of people that the public body can reasonably expect to attend. 3 *OMCB Opinions* 118, 120 (2001). For example, a public body would violate the Act by "deliberately [choosing] to meet in too small a space when a suitable, larger space was available." *Id*.; *see also* 9 *OMCB Opinions* 296, 300 (2015) (finding no violation of the openness mandate "without some indication that the public body knew that the size of the meeting space would preclude members of the public from observing the conduct of public business").

The submissions, taken together, show that the circumstances – a large crowd, a belief that no audio would be provided in the overflow room, and

[2] Statutory references are to the General Provisions Article (2014, with 2015 supp.) of the Maryland Annotated Code.

delayed entry into the building—discouraged people from attending the meeting, but that in fact audio was soon arranged for the hall and overflow room and people were admitted to those spaces. The submissions do not show that the Commission knew that its choice of this meeting space would preclude members of the public from observing the meeting. It also does not appear that either the Commission or its staff prevented people from entering the building. Thus, as far as we can tell, the problem was one of inadequate communication and crowd control, not of denial of access to the meeting or a deliberate choice of an inadequate meeting space. Given the Commission's efforts to assure that all attendees could hear the proceedings and that everyone who wished to comment could do so, we find that the Commission did not violate the Act by meeting in a room that turned out to be too small for the members of the public who wished to attend.

2. The telephone vote

Complainant questions whether the Commission violated the Act by voting over the telephone to approve the permit. The Commission states that the telephone vote did not occur in a "meeting" as defined by the Act and therefore was not subject to the Act.

The Commission's response gives the following history of the vote: During the February 11, 2016 meeting, members of the public had raised concerns that indicated a need for further documentation from the applicant, and the Commission made that request the next day, by letter. The permit application was on the agenda for the Commission's regularly-scheduled meeting on February 16. At that public meeting, the Commission discussed the application and the fact that it had not yet received some of the requested documents. After the members indicated that they had no remaining questions, the chair stated that no further deliberations were needed and that the Commission would vote after it had received the documents. On February 22, the Commission's executive director received the documents and sent them to the Commission members by separate emails. Later that day, according to his affidavit, he "contacted each member of the Commission to vote 'yea' or 'nay' on the permit application." He states: "After the February 16, 2016 meeting, and before the vote was taken on February 22, 2016, there were no deliberations between and amongst the members of [the Commission] and no further meetings of any kind of [the Commission."

The question before us is whether the executive director's separate telephone calls to the Commission members constituted a "meeting" subject to the Act. The Act does not require a public body to conduct its business in a meeting; instead, the Act simply requires that, when a public body does meet, it must do so openly unless the Act expressly provides otherwise. § 3-301. The Act defines the verb "to meet" as "to convene a quorum of a public body for the consideration or transaction of public business." § 3-101(g); see

also 9 OMCB Opinions 55, 56 (2013) (When . . . a quorum of the public body has not convened, the Act does not apply.").

We have often concluded that separately-held communications, held among fewer than a quorum of the public body's members and out of the presence of a quorum, do not constitute a "meeting" as defined by the Act. We reach the same conclusion here. Given the chair's instruction at the February 16 meeting that no further deliberations would be held (a fact confirmed by the Commission's minutes of that meeting), we have no reason to believe that the Commission members used the calls as a means to deliberate collectively among themselves, with the executive director as intermediary.

We also have often cautioned public bodies that conducting substantive public business this way—out of the public eye—invites suspicion. We repeat that caution here and refer the Commission to the guidance we gave in 8 *OMCB Opinions* 56 (2012). *See also* Open Meetings Act Manual 8-13 (November 2015) (discussing the meaning of "meeting").

Conclusion

In this opinion, we have concluded that the Commission did not violate the Act, and we have drawn the Commission's attention to the appearance of secrecy given by conducting public business in ways that the public cannot observe.

Open Meetings Compliance Board

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